

So much Love

 verfassungsblog.de/so-much-love/

Maximilian Steinbeis Sa 13 Jan 2018

Sa 13 Jan 2018

In the unsentimental world of constitutional law we rarely engage in romance. But I have to say, what is going on between the ECJ and the German Federal Constitutional Court is touching my heart. That old couple, together for ages. We love them both very dearly and their horrific periodical quarrels have been such a pain to watch, and every once in a while we even came close to believing that one of them might eventually pack his stuff and move out on the other. But lo and behold: We see them tenderly united, strolling through the park hand in hand as if nothing ever happened. Now, isn't that a happy sight! Well, best of luck to you two. You certainly are not always easy to have around and the airs you both like to give yourself from time to time would try the patience of even the saintliest lover to the utmost limit, to tell the truth. But on the whole, given that you just are who you are, I have to say: You're doing great.

What had happened? This time, I am sorry to say, the European Court of Justice was the one who started. Some four years ago, it decided to stick it to the national constitutional courts of the EU member states in the gruffest possible way. In the notorious Melloni ruling, it told them to stuff their own national expectations about fundamental rights for criminal defendants when those rights get into the way of the mutual recognition and enforcement of EU arrest warrants. Whoo! Well, my dear, was the snippy answer from Karlsruhe, we'll see about that! Before we extradite someone to the judiciary of another member state, we first check whether this violates his human dignity. Because human dignity is our highest constitutional value. Your Union law can't reach it, that's how high it is! And if you think we're going to refer that question to *you* for a preliminary ruling, then keep dreaming. Human dignity, Luxembourg growled back. Human dignity, human dignity. All right, then. We'll use your precious yardstick of human dignity. But our *own* human dignity! Union law, not national law. Because we, too, have human dignity protection as a fundamental right in our Union law! As long as you national courts stop fumbling about with your own different human dignity standards – fine.

The last act in this drama was performed this Thursday, in Karlsruhe. And such a happy ending! Oh certainly, darling, the Second Senate of the Federal Constitutional Court breathed. You have not yet been given the opportunity to make your position clear as to how many square metres per prisoner in Romanian jails are obligatory to meet the requirements of human dignity under EU law. Those impossible Court of Appeals judges in Hamburg really should have referred their case to you first, instead of deciding for themselves that Romanian jails are, all things considered, fit to hold German rights holders. The nerve of those people! It goes without saying that no one else is in charge of clarifying this issue but *you*, and as our constitution protects the right to have one's case decided by the legally competent judge, we'll repeal the order of the Hamburg court on this basis and be completely quiet about human dignity, even if that was what the plaintiff requested our opinion for in his constitutional complaint in the first place.

An end like a Jane Austen movie, isn't it? The bells are ringing, the smiling priest waits at the altar, we shed some happy tears, and whoever objects to the union of these two in a common *Verfassungsgerichtsverbund* may speak now or forever remain silent...

But enough of these frivolities. This was, in fact, quite a fortunate week for integration through law in the EU. ECJ Advocate General Melchior Wathelet, in his Opinion on the [Coman case](#), holds out the prospect of Romania having to recognise same-sex marriages from other member states however stubbornly they keep refusing to allow same-sex marriages in their own country. In Germany, the exploratory talks of the emerging coalition have been concluded, and the outcome, shamefully weak in most policy areas, gives some cause for hope in terms of European integration: a tougher stance towards Poland, the intergovernmental ESM to be incorporated into the treaties, and more money for the EU budget. Not quite where Macron wants us, yet. But some progress, at least.

Better too little than too much

Apart from that, the entry into force of the infamous "Network Enforcement Act" in **Germany** has caused quite a commotion this week. The responsibility imposed on the social networks to determine where freedom of expression ends and hate speech begins had a rocky start, to put it mildly. [MATHIAS HONG](#) considers this to be a structural problem inherent in the nature of a law that sanctions only "under-blocking" and thereby encourages or even enforces "over-blocking".

In **France**, as [THOMAS HOCHMANN](#) reports, the Constitutional Council has sent the legislature back to the drawing board after overturning another legislative attempt at making visits to terrorist websites a criminal offense.

+++ A Note from GLOBAL CONSTITUTIONALISM +++

CfP Scholars Workshop: Challenges to Global Constitutionalism

The editorial team of [GLOBAL CONSTITUTIONALISM](#), in conjunction with PluriCourts, will be organizing a workshop from July 4th to 6th at the WZB Berlin Social Science Center. As part of this workshop we will be running special sessions for scholars interested in publishing in the field of global constitutionalism. Each selected scholar will be invited to present a paper to the workshop. Details are [here](#). If you have any questions, please contact: globcon-journal@wzb.eu.

+++++

The other top institution of judicial control of state action in **France**, the *Conseil d'État*, was active as well, albeit in a less laudable way, according to [SÉBASTIEN PLATON](#): With the blessing of the highest administrative court, France is again and again dodging its Schengen obligation to put a time limit to the reintroduction of border controls.

Our online symposium on memory law in Europe is well underway: [ERIC HEINZE](#) outlines the shape of this emerging field of research. [NIKOLAY KOPOSOV](#) investigates the inherent connection between memory politics through law and nationalism. [GRAZYNA BARANOSWKA](#) describes the futile struggle of the relatives of the Katyń massacre in

Poland to obtain information on the fate of their murdered kinsmen. MARIA MÄLKSOO examines and criticises the memory legislation of **Ukraine**. GÁBOR HALMAI describes the efforts of the Hungarian Constitution of 2011 to regulate the country's view of its own past, and MARINA BÁN describes the bizarre consequences of the ban on the Red Star in **Hungary**, which is not only a communist symbol but also a trademark of the Heineken brewery. Finally, JIRI PRIBAN looks back on the affair about the writer Milan Kundera in the **Czech Republic** and sees a post-communist “neurotic collective memory” at work.

Elsewhere

OLIVER GARCÍA criticises the Federal Constitutional Court in **Germany** for its recently published ethical guidelines for its judges, which aim to restrict, among other things, the incentives for members of the court to make a pretty penny on the expert-opinion and lecture market after their retirement by selling out the prestige of their former office. (If the names Udo Di Fabio and Hans-Jürgen Papier spring to your mind: You may very well think that but Mr. Voßkuhle couldn't possibly comment). What García does not like about this is the lack of proper legal quality of these guidelines which, in his view, is not a good sign for the health of a constitutional culture, and certainly not if they are introduced by the very institution whose task is to protect the constitution (in German).

KENNETH ARMSTRONG dampens our hope for a second **UK** Brexit referendum.

GERMÁN TERUEL LOZANO analyzes a move of the governing *Partido Popular* in **Spain** to regulate anonymity on the Internet (in Spanish).

RICHARD MACKENZIE-GRAY SCOTT examines whether the allegations made by Amnesty International that the **EU** is partly to blame for torture and human rights violations against refugees in Libya entail not just a moral but also a legal responsibility.

MARK GRABER denies that the Constitution of the **United States** allows for the impeachment only of mentally or physically ill Presidents and finds that Donald Trump is so utterly and obviously unfit for office that he clearly meets all the constitutional requirements.

PIERRE DE VOS has some advice for the Parliament of **South Africa** on how to fulfil the Constitutional Court's mandate to regulate the impeachment of the President.

STEFANUS HENDRIANTO reports on an extremely close (4:5) ruling by the Constitutional Court of **Indonesia**, according to which the court is not competent to declare extramarital and same-sex intercourse illegal, and warns against prematurely celebrating this verdict as a victory for the LGBT cause.

So much for now. Have a good week and see you soon. If you would like to receive this editorial on a weekly basis in your mailbox and don't already do: just enter your email address [here](#).

All best, take care, and much love!

Max Steinbeis

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Steinbeis, Maximilian: *So much Love*, *VerfBlog*, 2018/1/13,
<http://verfassungsblog.de/so-much-love/>.